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No. 96-373

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNDA BROOKS; VERNA HOBSON; GERALDINE BAVARO; HARRIET EATON; JANE DOE and RICHARD ROE, as parents and guardians of, respectively, MICHAEL BROOKS; THERESA HOBSON; LISA BAVARO; EMILY EATON; JOHN DOE, and RACHEL ROE,

Petitioners,

—against—

GEORGE E. PATAKI, as Governor of the State of New York; THOMAS A. MAUL; JOEL A. DVOSKIN, and JAMES L. STONE as, respectively, Commissioners of the New York State Office of Mental Retardation and Developmental Disabilities; Office of Mental Health, and Department of Social Services,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether certiorari should be granted to review an order of the Court of Appeals that reversed a preliminary injunction because most of petitioners' claims were barred by *res judicata* and petitioners have no likelihood of success on their one surviving due process claim?

PARTIES

The following parties were appellees in the court below and are petitioners here: Lynda Brooks; Verna Hobson; Geraldine Bavaro; Harriet Eaton; Jane Doe and Richard Roe, as parents and guardians of, respectively, Michael Brooks; Theresa Hobson; Lisa Bavaro; Emily Eaton; John Doe and Rachel Roe.

The following parties were appellants in the court below and are respondents here: George E. Pataki, as Governor of the State of New York; Thomas A. Maul, as Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities; James L. Stone, as Commissioner of the New York State Office of Mental Health; Brian J. Wing, as acting Commissioner of the New York State Department of Social Services.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents, the Governor of the State of New York and three State Commissioners (the "State respondents"), submit this brief in opposition to the petition for a writ of certiorari

to review the order of the United States Court of Appeals for the Second Circuit issued May 31, 1996, which vacated a preliminary injunction against the State respondents and remanded the matter to the district court for further proceedings.

STATEMENT OF THE CASE

This action, commenced pursuant to 42 U.S.C. § 1983, involves transitional care funding ("TCF") in New York State for young adults who, as children with disabilities or other problems, had been placed by local school districts or local social services districts into residential schools, many of them out of state. Having reached age 21, these young adults have "aged out" of their programs. TCF exists as a temporary funding mechanism for allowing such young adults to remain in a children's program until appropriate adult placement can be secured.

Pursuant to federal and New York State law, children are entitled to a free and appropriate education. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1471, et seq., New York State Education Law § 4002(1). The assurance that children with disabilities receive an appropriate education requires, for some children, placement in a residential school. Where suitable educational opportunities do not exist in the district where the child resides, residential placements may be made in other districts within the state, or "the school district of which each pupil is a resident is authorized to contract with an educational facility located outside the state, which, in the judgment of the department, can meet the needs of such child for instruction." New York State Education Law § 4407(1)(a).

Once children "age-out" of their educational placements, they may apply to the appropriate agency for adult services.[1]

[1] There is no right to adult services in New York State. *See Savastano v. Prevost*, 66 N.Y.2d 47, *reargument denied*, 66 N.Y.2d 1036 (1985) (provisions of the Mental Hygiene Law "demonstrate the intention of the

The care and treatment of mentally and physically disabled adults is charged primarily, to the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") and the New York State Office of Mental Health ("OMH"), whose responsibilities are to assure the development of comprehensive plans, programs, and services in the areas of research, prevention, and care, treatment, rehabilitation, education, and training of the mentally retarded and developmentally disabled and the mentally ill, respectively. *See* New York State Mental Hygiene Law ("Mental Hygiene Law") §§ 7.07, 13.07.

From 1982 until the passage of Chapter 600 of the Laws of 1994, 1994 N.Y. Laws, c.600 (adding N.Y. Social Services Article 8-B, effective Jan. 1, 1995), ("Chapter 600"), annual appropriations bills provided partial state reimbursement funds to participating local social services districts allowing young adults to remain in their children's program until appropriate adult placements were secured. As the appropriations were provided on a strictly year to year basis, petitioners had no expectation of future funding for their transitional care, and no statutory entitlement was created. Other than the annual appropriations bills, which solely provided for partial reimbursement to participating localities, there was no statutory authority relative to transitional care funding until the passage of Chapter 600 in 1994. That Chapter expressly disavowed any right or entitlement to services, placement or funding of transitional care by the State. 1994 N.Y. Laws, c.600, § 16 ("No provision of this act shall be deemed or construed to create any right, interest or entitlement for any individual to receive mental hygiene, education or social services funds or services, or placement in a mental hygiene facility, or any other right, interest or entitlement to services, funds or placement").

Legislature not to create a mandatory duty but to vest discretion in respondent Commissioner, and to allow him to consider budgetary restrictions in implementing a program").

Effective June 1, 1995, the City of New York discontinued all funding for the transitional care of its residents.[2] Since the State's only responsibility under Chapter 600 before 1999 is to reimburse local social services districts for 60% of their approved expenditures under the statute, 1994 N.Y. Laws, c.600, § 3, there was no longer any legal basis for the State to reimburse the City. The actions of the City and the State were challenged in State court proceedings brought against State respondents entitled *New York Council for Exceptional People, et al. v. Pataki et al.*, Index No. 102684/95 (Sup. Ct., N.Y. County) ("*NYCE*"). On June 13, 1995, State Supreme Court Justice Helen Freedman held that the City "is not obliged to fund the TCF Program and that at present the State's obligations are contingent upon participation by the City." (slip op. at 11-12).

By decision and order dated October 5, 1995, the New York Appellate Division, First Department, unanimously affirmed the lower court's decision in *NYCE*, stating that "[t]he lack of merit to plaintiffs' claim that they are entitled to continued

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[2] Effective December 31, 1995, Suffolk County discontinued all funding for the transitional care of its residents thereby removing the State's reimbursement obligation. In a § 1983 action entitled *Suffolk Parents of Handicapped Adults, et al. v. Pataki, et al.*, plaintiffs alleged that the State defendants were violating their due process and equal protection rights. In April 1996, the district court granted plaintiffs' motion for a preliminary injunction and directed the State defendants to fund plaintiffs' transitional care. 921 F. Supp. 970 (E.D.N.Y. 1996); 924 F. Supp. 421 (E.D.N.Y. 1996). Suffolk County and the State defendants appealed from the district court's order. *Suffolk Parents* is *sub judice* in the Court of Appeals.

Effective January 31, 1996, Westchester County discontinued all funding for the transitional care of its residents. Plaintiffs commenced an action entitled *Westchester Advocates for Disabled Adults, et al. v. Pataki, et al.*, pursuant to 42 U.S.C. § 1983, alleging the same violations as in *Suffolk Parents*. In June 1996, the district court granted plaintiffs' motion for a preliminary injunction. __ F. Supp. __, 1996 WL 36139 (E.D.N.Y. June 17, 1996). The County and State appeals in *Westchester Advocates* are being perfected in the Court of Appeals.

transitional care funding is demonstrated by the plain words of Social Services Law article 8-B." *New York Council for Exceptional People, et al. v. Pataki et al.*, 632 N.Y.S.2d 531 (1st Dep't 1995). In analyzing the plain words of the statute, the Appellate Division emphasized that Section 16 of Chapter 600 expressly states that transitional care recipients do not have any right, interest or entitlement to services, funds or placement. *Id.* Plaintiffs' motions for leave to appeal to the New York State Court of Appeals were denied. (unpublished slip op.)

The *NYCE* petitioners then commenced this § 1983 action. Defendants include, *inter alia*, the Governor and three State Commissioners.

Petitioners in this action are individuals who were placed in out-of-state transitional care facilities by New York City, not New York State or its agencies. State respondents' only connection with petitioners was to fulfill the State's statutory duty to reimburse the City for 60% of the City's approved expenditures on transitional care pursuant to Chapter 600. None of the out-of-state schools at which petitioners have resided are state-operated facilities, but rather are independent institutions that State respondents have never directly paid for transitional care costs. Likewise, the State has never directly reimbursed the mentally disabled residents of these schools for the cost of transitional care.

The district court granted petitioners' application for a preliminary injunction and directed the State respondents to "take all necessary steps, including but not limited to payment of out-of-state facilities at which petitioners currently reside, to maintain plaintiffs in their present placement until, following evaluation procedures . . . orderly transition to permanent State approved placement is accomplished." (68a).[3] The Court of Appeals reversed the district court's order. The

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[3] References to pages of the appendix to the petition appear herein as "__a".

Court held that most of petitioners' claims were barred by *res judicata* because they were, or could have been, raised in the state court *NYCE* case, including petitioners' equal protection claim. (21a-25a). The Court of Appeals added that "State defendants had no duty under the Due Process Clause to provide professionally adequate care to the plaintiffs, and therefore have no duty to resume TCF payments for the plaintiffs' out-of-state care." (26a).

With regard to one surviving due process cause of action, the Court of Appeals held that because the State has not taken an affirmative act restraining the freedom of the individuals receiving transitional care, the State has not created a deprivation of liberty which is necessary to trigger the protections of the Due Process Clause. (26a-30a). Thus, the Court of Appeals stated:

> Plaintiffs here are under no state-imposed restraint. The whole effort of the guardians, here and in state court, has been to prolong the involvement of the City and the State in the funding of institutional placements as to which the City and the State have washed their hands. *DeShaney* therefore subverts the district court's conclusion that the State Defendants had assumed 'by word and by deed,' a duty to provide plaintiffs a smooth and orderly transition to in-state care, including continuous full funding of out-of-state care prior to their transfer. *DeShaney* flatly rejected as the sole ground for a due process right an expressed intent to provide assistance, or even a failed initiative to do so. . . . Therefore, the injunction cannot be premised on a duty to 'exercise professional judgment' under *Youngberg* and *Society for Good Will*, because there is no such duty here.

(29a) (citations omitted).

Petitioners' motion for rehearing containing a suggestion for rehearing *in banc* was denied on August 7, 1996. (70a-71a). Petitioners now seek review of the Court of Appeals' order which vacated the preliminary injunction.

REASONS FOR DENYING THE WRIT

A. THE TERMINATION OF TRANSITIONAL CARE FUNDING BY THE STATE DOES NOT IMPLICATE ANY INTEREST PROTECTED UNDER THE DUE PROCESS CLAUSE

Petitioners did not—and could not—demonstrate likelihood of success on their due process claim. The Court of Appeals has stated that

> [A] plaintiff may not successfully claim a deprivation of property without due process absent identification of a protected property interest. . . . '[T]he nature of the interest [must be] one within the 'liberty or property' language of the Fourteenth Amendment'. . . . The Federal Constitution does not create property interests. Instead, such interests are derived from other sources such as state law.

West Farm Assocs. v. State Traffic Comm'n of the State of Connecticut, 951 F.2d 469, 472 (2d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992).

The individuals who were receiving funding for transitional care did not have an entitlement to that funding. Rather, such funding was provided as a matter of discretion on the part of local social services districts. New York Social Services Law § 466(2) (as enacted in Section 3 of Chapter 600) provides:

> Social services districts *may* expend funds to provide transitional care as described in this section. Approved expenditures for transitional care by social services districts, including the costs of administration and after first deducting therefrom any federal funds properly received or to be received on account thereof, shall be subject to state reimbursement at the rate of sixty per centum for periods on or after January first, nineteen hundred ninety-five.

(emphasis added.)

Not until 1999 will New York State be obligated to pay 100% of transitional care expenditures. Social Services Law § 466(6) (as enacted in Section 3 of Chapter 600) provides:

> On and after January first nineteen hundred ninety-nine, all expenditures related to transitional care for persons remaining in such care at that time shall become the sole responsibility of either the office of mental retardation and developmental disabilities or the office of mental health, whichever has accepted responsibility for the adult placement or services.

Clearly, at present, local social services districts are not mandated to provide this funding. If a social services district chooses to provide the funding, the State then reimburses it for 60% of the approved expenditures.

Indeed, Section 16 of Chapter 600 states:

> No provision of this act shall be deemed or construed to create any right, interest or entitlement for any individual to receive mental hygiene, education or social service funds or services, or placement in a mental hygiene facility, or any other right, interest or entitlement to services, funds or placement.

Thus, under the plain language of Chapter 600, petitioners have no right or entitlement to State funding of transitional care. In fact, the courts of New York have repeatedly interpreted Chapter 600 as written. In so doing, the state courts have recognized the intent of the New York State Legislature that "[s]ocial services districts *may* expend funds to provide transitional care" (Section 3 of Chapter 600) (emphasis added), that approved expenditures for transitional care are subject to State reimbursement of 60% after January 1, 1995 (*id.*), and that "[n]o provision of this act shall be deemed to create any right, interest or entitlement . . ." (Section 16 of Chapter 600).

Apparently recognizing that they have no protected property right to transitional care funding, petitioners argue that transitional care funding implicates a substantive due process liberty interest. Petitioners' brief at 11. The Court of Appeals correctly concluded that petitioners have no likelihood of success on this claim.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court, though holding that mental patients involuntarily committed to state facilities had certain substantive rights under the Due Process Clause of the Fourteenth Amendment, also made clear that "a State is under no constitutional duty to provide substantive services for those within its border." *Id.* at 317. In *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199 (1989), this Court explained that its decision in *Youngberg v. Romeo*, as well as in *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983),

> stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . .In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Here, the State has not incarcerated or involuntarily institutionalized any of the individuals receiving transitional care funding in out-of-state residential facilities, or held them there against their will. The State, therefore, did not incur any constitutional obligations to these transitional care individuals. Rather, its sole obligation was to reimburse participating local social services districts for part of their approved

transitional care expenditures. *See Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465-66 (3d Cir. 1990) (severely mentally retarded individual's due process rights were not implicated by the state because his parents voluntarily placed him at the facility; under *DeShaney*, he was not deprived of " 'freedom through incarceration, institutionalization or other similar restraint of personal liberty' ").

Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), does not change this analysis. In *Society for Goodwill*, the Court of Appeals held the plaintiffs in that case had a due process right to "training sufficient to prevent basic self-care skills from deteriorating." 737 F.2d at 1250. Unlike petitioners here, however, the plaintiffs in *Society for Good Will* were residents of a state-operated facility for the mentally retarded and developmentally disabled. Thus, the State's obligation to provide care and funding was undisputed. Petitioners in this case, by contrast, do not reside in a state-operated facility, and the State has taken no action depriving them of their liberty. Where, as here, the State owes no duty to petitioners, there can be no due process right to a continuation of services and funding. *See Philadelphia Police and Fire Ass'n for Handicapped Children v. City of Philadelphia*, 874 F.2d 156 (3d Cir. 1989) (mentally retarded persons living at home have no substantive due process right to continued habilitation services in light of *DeShaney*).

Petitioners argue that they are "in effect" involuntarily institutionalized because they were placed in residential educational placements as children and were then "[r]equired to stay in the same institutions when they reached adulthood, [because] all remain utterly incapable of making their own decisions for residence, care and treatment." Petitioners' brief at 2. The facts, however, contradict petitioners' argument that they are required to remain in their educational placements. Moreover, the question of petitioners' voluntary/involuntary status does not turn on the severity of their disability, but rather on whether "the State by the affirmative exercise of its

power removed [plaintiffs] from free society" and exercised its power to restrain them. *See Deshaney*, 489 U.S. at 201, n. 9. Here, petitioners have never been under any state imposed restraint.

B. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONERS' REMAINING CLAIMS, INCLUDING THEIR EQUAL PROTECTION CHALLENGE, WERE BARRED BY *RES JUDICATA*

The Court of Appeals held that petitioners' remaining due process claims, (21a-25a), as well as their equal protection claim, (22a), were barred by *res judicata* because the underlying factual predicates were substantially identical to the allegations made by petitioners in state court. In the state court *NYCE* matter, petitioners raised the issue of whether the State could terminate transitional care funding without holding administrative hearings. The state trial and appellate courts held that there was no due process right to such hearing because the funding by the localities was purely discretionary, the individuals for whom funding was provided did not have an entitlement to that funding, and the State's sole obligation to reimburse the local social services districts for 60% of their approved expenditures was contingent upon the City's willingness to continue the funding.

The preclusive effect of the state courts' decisions in *NYCE* applies to the specific claims asserted in that action and to all claims arising from the transaction at issue which could have been asserted in that action. *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986). Concluding that petitioners' clams were or could have been raised in *NYCE*, the Court of Appeals correctly determined that petitioners' remaining claims, including their equal protection argument, were barred by the doctrine of *res judicata*. (21a-25a). This holding raises no conflict or important question of federal law which needs to be settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
October 15, 1996

Respectfully submitted,

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